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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-670

Filed: 1 August 2017

Wake County, No. 12 CVS 7420

VECELLIO & GROGAN, INC., Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant.

Appeal by defendant from order entered 3 March 2016 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 30 November 2016.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, for plaintiff-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for defendant-appellant.

STROUD, Judge.

Defendant North Carolina Department of Transportation appeals from the trial court's order allowing plaintiff Vecellio & Grogan, Inc.'s motion for an order

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requiring that the \$325,449.33¹ held by defendant as anticipated liquidated damages be released, since all claims and counterclaims had been fully adjudicated and satisfied. The order also denied defendant's Rule 60 motion for relief from judgment. On appeal, defendant argues that the trial court abused its discretion by allowing plaintiff's Rule 60(b) motion and denying defendant's motion. After review, we find that the trial court did not abuse its discretion, but we also remand for correction of a clerical error in the court's order.

Facts

The case arises from underlying claims by plaintiff in relation to a construction contract with defendant. Plaintiff filed suit in Wake County on 24 May 2012, and the matter was heard by Judge Howard E. Manning, Jr. over the course of 10 days in October and November 2014. Following the conclusion of the bench trial, Judge Manning entered a 72-page "Memorandum of Decision and Judgment" on 10 July 2015. The trial court awarded plaintiff a principal amount of \$4,455,148.00 plus interest and defendant liquidated damages at a rate of \$10,000.00 per day for 63 days, for a total of \$630,000.00. In setting this liquidated damages amount, the trial court explained in the order:

451. The Court has previously found that [plaintiff] is responsible for 63 days of delay for the

¹ As discussed in more detail below, the parties and the trial court reference the amount at issue occasionally as "\$325,449.33" and occasionally as "\$325,499.33." It appears \$325,449.33 should be the amount at issue, and any other recitation of the amount in question appears to be a clerical error.

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Project's completion. Accordingly, [defendant] is entitled to liquidated damages in the contract amount for 63 days. The contract provides for \$10,000.00 per day for liquidated damages. 63 days @ \$10,000.00 per day is \$630,000.00. This amount is a set-off against the total amount, including interest, finally determined to be awarded to [plaintiff].”

Plaintiff filed a motion for relief from judgment on 3 December 2015 under Rule 60 asking the trial court to clarify its previous order and declare that defendant should have received only \$630,000.00 for liquidated damages -- as stated in the trial court's order -- and that defendant must pay plaintiff the \$325,449.33 previously set aside for liquidated damages but not credited when defendant offset its damages from the judgment amount owed to plaintiff. Plaintiff's motion argued that defendant gave plaintiff a check for \$4,223,858.79 on 30 July 2015, which was the final amount owed to plaintiff, less \$630,000.00. Plaintiff then explained:

5. By letter dated September 3, 2015, (Exhibit 2) (enclosures omitted due to large volume), [plaintiff] advised [defendant] that [defendant] had erred in its July 30, 2015, payment by improperly deducting the entire NCDOT LD award of \$630,000 from the Total V&G Award because [defendant] had previously withheld in its final Contract payment to [plaintiff] the amount of \$325,449.33 as a set-off towards its liquidated damages claim. . . .

Plaintiff then argued that defendant “should have either applied the \$325,449.33 it previously retained as a credit toward the NCDOT LD Award or made a separate payment to [plaintiff] of the \$325,449.33 amount.” Thus, plaintiff contended that

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defendant got a “double recovery” of a portion of the liquidated damages awarded by the trial court.

Defendant submitted its response on or about 5 January 2016² asking the trial court to leave the original judgment in place and not grant plaintiff’s motion. Defendant argued that plaintiff “never made this claim for unpaid quantities [of \$325,449.33]” and instead only “sought remittance of [liquidated damages] in the amount of \$94,000.00 and interest[.]” Defendant argued that plaintiff was trying to assert a new claim and that Rule 60 does not allow for that. Plaintiff replied on 12 January 2016, noting that defendant does not appear to contest that it had withheld the disputed amount and arguing that defendant’s assertion that plaintiff was trying to bring a new claim with the Rule 60 motion was in error. Plaintiff reiterated its request that the trial court issue “clarification” that the intent was for defendant to receive just \$630,000.00 as liquidated damages, not anything further.

On 18 February 2016, defendant filed its own Rule 60 motion asking the trial court to deduct \$156,707.50 from any amount awarded to plaintiff in relation to its Rule 60 motion if the court decided to rule in plaintiff’s favor. Defendant referred to this amount as “the alternative, un-awarded ‘Cumulative Impact’ claim.” Defendant attached as exhibits to its motion a July 2015 joint motion of the parties requesting that the trial court “confirm the correct amount of pre-Judgment interest computed

² Defendant’s response in the record on appeal does not appear to have been file stamped.

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in accordance with the Memorandum of Decision and Judgment filed July 10, 2015 in this matter[.]” Defendant also attached as an exhibit the trial court’s 28 July 2015 order confirming the amount of pre-Judgment interest as \$398,710.33.

On 3 March 2016, the trial court entered an order on the Rule 60 motions, stating in full as follows:

This matter came before the Court during the Court’s February 8, 2016 civil administrative session, upon Plaintiff’s motion for an order requiring the amount of \$325,499.33, currently held by the North Carolina Department of Transportation as anticipated liquidated damages, be released to Plaintiff since all claims and counterclaims in this case have been fully adjudicated and satisfied by the parties by previous orders of Judge Howard Manning, which are now final and from which there has been no appeal.

At the time of Judge Manning’s decisions, the parties were not aware of the existence of the aforesaid sums being withheld.

Judge Manning has retired and is not available to hear this matter. Pursuant to G.S. 1A-1, Rule 63, the undersigned Senior Resident Superior Court Judge has considered the motion.

The Plaintiff’s motion is allowed. Plaintiff shall have and recover from NCDOT the amount of \$325,499.33 which has been heretofore withheld.

The Court has also considered the motion of NCDOT filed February 18, 2016 entitled “NCDOT’s Rule 60 Motion for Relief from Judgment.” Upon due consideration, that motion is denied.

So ordered this, the 3rd day of March, 2016.

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Defendant timely appealed this order to this Court.

Discussion

Defendant argues on appeal that the trial court abused its discretion by granting plaintiff's Rule 60 motion and by denying defendant's Rule 60 motion. We address defendant's arguments as related to each motion below.

I. Clerical Error in Trial Court's Order

We note from the outset an issue that neither party raises but that was observed upon review regarding the amount in dispute. Plaintiff's initial Rule 60 motion listed the amount as "325,449.33." Plaintiff's letter to defendant, attached as Exhibit 2 with plaintiff's motion, also listed the amount as \$325,449.33. Similarly, plaintiff's Exhibit 3 contains an accounting and lists the math, indicating the "Balance Owed" as \$325,449.33. Defendant's response to plaintiff's motion further stated the amount in question as \$325,449.33.

Plaintiff's reply motion, however, stated the amount in dispute as \$325,499.33. Defendant's motion for Rule 60 relief stated the amount as \$325,449.22. Finally, the trial court's order stated the amount as \$325,499.33. Obviously, only one accounting is correct and a clerical error has occurred along the way. *See, e.g., State v. Allen*, __ N.C. App. __, __, 790 S.E.2d 588, 591 (2016) ("A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." (citation,

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quotation marks, and brackets omitted)). Given that the majority of the motions and documents in the record -- plus the parties' briefs on appeal -- use \$325,449.33 as the value, it appears \$325,449.33 should have been the amount stated in the trial court's order. Accordingly, we must remand for the trial court to correct this clerical error.

II. Granting of Plaintiff's Rule 60 Motion

Defendant first argues on appeal that the trial court abused its discretion when it allowed plaintiff's Rule 60(b) motion. Rule 60(b) allows for relief from a judgment or order due to multiple issues, including but not limited to mistake, fraud, the judgment being void, or "[a]ny other reason justifying relief from the operation of the judgment."

Our standard to review the trial court's ruling on a Rule 60(b) motion is well settled. A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion. A trial judge's extensive power to afford relief under Rule 60(b) is accompanied by a corresponding discretion to deny it, and the only question for our determination is whether the court abused its discretion in denying defendant's motion. A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.

McKyer v. McKyer, 182 N.C. App. 456, 459, 642 S.E.2d 527, 529-30 (2007) (citations, quotation marks, brackets, and ellipses omitted).

Defendant argues that the trial court abused its discretion when it "ruled in [plaintiff's] favor and granted it an additional \$325,449.33." Defendant claims that

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“[t]he awarding of the \$325,449.33 was the awarding of affirmative relief which case law prohibits a Rule 60 order from providing.”

We disagree with defendant’s characterization of the amount at issue. Plaintiff did not assert a new claim with its Rule 60 motion, but rather argued that defendant -- by withholding the \$325,449.33 without accounting for it with its liquidated damages award credit -- was able to receive “double recovery” for a portion of the liquidated damages award. And the trial court’s order simply acted to prevent the double recovery from happening. Defense counsel claims that the \$325,449.33 was known to plaintiff in October 2011 so it “should have been requested as part of the litigation, and not sought after, post-verdict.” However, at the hearing, the trial court asked defendant’s counsel:

THE COURT: Did anyone know at the time that you were trying this case that there was \$355,000 [sic]³ that you had withheld as offset funds?

[Defendant’s counsel]: It never came up.

When the trial court expressed doubt as to why this amount would have never come up, defense counsel stated: “We’re dealing with \$15 million[,]” referencing the fact that this case involved very large monetary claims, multiple issues, and lengthy testimony. It is not difficult to imagine why this disputed amount of compensation

³ It appears this \$355,000 amount is either a typo in the transcript or just a misstatement by the trial court, as the court references “325” and “\$325,000” throughout as the amount in dispute.

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withheld by defendant may have been overlooked or undetected by plaintiff over the course of litigation.

Additionally, it is evident that the amount at issue is not an additional claim by plaintiff, but was held by defendant for litigated damages. Although reluctant to admit at first, defendant's counsel eventually stated at the 8 February 2016 hearing that defendant did not dispute that it was holding the \$325,449.33 as liquidated damages:

THE COURT: But you acknowledge that you're holding money that they would otherwise be entitled to but you're holding it because they have not timely complied with various aspects of their obligations under these contracts and that amount of money is \$325,499 [sic], right?

[Defendant's counsel]: Yes.

Furthermore, defendant's brief acknowledges that "[i]n October 2011, [defendant] withheld payment to [plaintiff] in the amount of \$325,449.33 due to the assessment of liquidated damages[.]"

As plaintiff notes, both at the hearing and on appeal the parties also reference a smaller amount of money -- \$94,000.00 -- as being withheld by defendant. Defendant claims that the trial court "denied [plaintiff's] request for the \$94,000.00, for remission of liquidated damages" and that plaintiff did not appeal that decision, so plaintiff's Rule 60 motion should have been denied as untimely. We once again disagree with this characterization of the issue before us.

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The trial court ruled that the \$94,000.00 that defendant withheld was to be included in the liquidated damages award, rather than remitted separately:

434. The Court finds that [plaintiff] is not entitled to remittance of the liquidated damages being withheld by [defendant] in the amount of \$94,000.00. However, this amount is to be included in the amount of [defendant's] counterclaim for liquidated damages which is to be determined based on 63 days of delay.

Plaintiff did not raise this issue in its Rule 60 motion with the underlying order by Judge Manning, as defendant claims, but rather brought to the attention of the trial court an unjust double recovery on the part of defendant by withholding these funds and not attributing those to its liquidated damages recovery allowed by Judge Manning's order.

The trial court established in the initial order -- which was not appealed by either party -- that defendant was entitled to 63 days of liquidated damages at the contract price of \$10,000.00 per day, for a total of \$630,000.00. Defendant's attempts on appeal to characterize the amount it withheld for liquidated damages as something else are not persuasive. Plaintiff appropriately used Rule 60 to bring this issue to the trial court's attention. Accordingly, we conclude that the trial court did not abuse its discretion when it granted plaintiff's Rule 60 motion and clarified that defendant cannot recover twice a portion of the liquidated damages award.

Defendant also argues that even if plaintiff was entitled to its Rule 60(b) relief, the trial court should have reduced the amount by \$86,000.00, which defendant

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claims that plaintiff admitted it was responsible for. Defendant's argument goes beyond what is necessary for this issue to be determined on appeal and raises arguments related to the underlying order which was not appealed. Further, because we have found the trial court did not abuse its discretion in granting plaintiff's Rule 60 motion, we need not examine defendant's alternative arguments on this issue in more detail. *See, e.g., Pope v. Pope*, __ N.C. App. __, __, 786 S.E.2d 373, 379 (2016) (“[A]s we have already held there was no error in setting aside the DVPO [under Rule 60(b)(5)], and plaintiff-husband's third and final argument on appeal is essentially an alternative one, . . . we need not address it.”).

III. Denial of Defendant's Rule 60 Motion

Finally, defendant argues that the trial court abused its discretion in denying defendant's Rule 60(b) motion “to disallow the award of interest on the alternative ‘Cumulative Impact Claim.’” (Full caps in original). Defendant's argument, however, is precisely the type of argument it claims -- albeit unsuccessfully -- that plaintiff was trying to make with its Rule 60 motion. Defendant points to a portion of Judge Manning's order describing a “double dip” problem in relation to this claim but then notes that Judge Manning granted plaintiff \$156,707.50 in interest on the Cumulative Impact Claim. Defendant acknowledges that “[w]hile [defendant] chose not to file an appeal of Judge Manning's decision on this issue, it certainly now seeks the equitable right to setoff this amount if [plaintiff's] Rule 60 Motion were to

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prevail.” Defendant is asking this Court -- and previously the trial court -- to rule on an issue already decided by the trial court in Judge Manning’s order, but that order was not appealed and thus is binding. Accordingly, we find the trial court did not abuse its discretion by denying defendant’s Rule 60 motion.

Conclusion

In sum, we hold that the trial court did not abuse its discretion by granting plaintiff’s Rule 60 motion and clarifying that defendant should have included the \$325,449.33 in its initial liquidated damages award or remitted it back to plaintiff if it failed to do so after offsetting the full \$630,000.00 it was entitled to by the trial court’s order. We also find the trial court did not abuse its discretion by denying defendant’s Rule 60 motion. We therefore affirm the actions of the trial court, but remand for correction of the minor clerical error in the trial court’s order reciting the amount at issue.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges HUNTER, Jr. and DAVIS concur.

Report per Rule 30(e).